

# 10 Anti-Constitutional Commandments

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Poland is on the eve of the parliamentary elections to be held on October 13, 2019. This provides a good opportunity to step back for a second to analyse the turbulent years of 2015-2019 and to piece together scattered elements of a new constitutional doctrine that has emerged since November 2015. Such a perspective should help readers of *Verfassungsblog* to truly understand and appreciate the scale and depth of the change that has happened to the prevalent (and what was presumed to be unshakeable) post-1989 constitutional paradigms.

The Polish case provides powerful proof and warning that constitutional safeguards alone will not do the trick. It teaches us that sustaining democracies long-term depends less and less on the institutions, and more and more on the intrinsic qualities of the citizenry and of the political leadership, civic loyalties and popular resistance against the decreed top-down “good change”. Even the strongest institutions must fall when they are not able to garner public support. The political culture has much more to do with the constitutional culture, rather than just legal text and intricate institutional setting. If anything, 2015-2019 in Poland has shown painfully that building institutions is much easier than shaping (neglected) habits of heart.

## The Background

What we have witnessed in Poland in 2015-2019 is the crucial process of transitioning from “resentment” as a vague emotion of rejection and critique of the unsatisfactory liberal *status quo* to the more formalized and institutionalized “politics of resentment”. This transitioning is crucial because with it a resentment becomes anchored within mainstream politics and is articulated in the public sphere. Just like Nietzsche’s *ressentiment* was crucial in the slaves’ revolt against their masters, resentment today needs a constitutional code of morality and legality, a constitutional channel to give voice to the emotion and to turn into a constitutional and political variable. The resentment alone is an emotion in need of a constitutional doctrine, and the politics of resentment adds this crucial dimension of translation: a constitutional doctrine that competes with the dominant liberal constitutionalism and delivers on the promise of populist and emotion-driven narratives.

The new doctrine goes beyond constitutional bad faith, though. It adopts a relentless abuse of constitutional arrangements and engages in rampant legal instrumentalism at the disposal of the political. The law no longer has its fixed meaning. Rather it changes in response to the demands of the politics. What truly differentiates the “politics of resentment” from mere contestation and dissatisfaction with the *status quo* is the *constitutional break* with hitherto prevalent constitutional principles, and the wholesale rejection of the existing constitutional order. It advocates total *capture* of the old and allegedly corrupt institutions, and in their place brings to life a new

institutional order. The constitutional capture connotes a systemic weakening of checks and balances and the entrenchment of power by making future changes to control difficult. Constitutional capture has an inherent spill-over effect, and as such, the seemingly isolated constitutional capture in Poland and elsewhere carries the risks of adverse consequences throughout the entire continent. Most importantly, it needs its own justificatory framework and toolkit. When analysed from a more systemic perspective, 2015-2019 allows us to locate the elements of such a framework and a doctrine. They are inextricably interconnected and self-reinforcing and as such sometimes must be grouped together. Only by adopting such holistic approach can we unveil the full scope and content of the doctrine.

## **Meet the new doctrine**

### *1. New understanding of the role of a constitution*

A constitution is no longer understood as a higher law of universal principles but as yet another tool to protect the existence and uniqueness of the state. A constitution becomes an outlet for political expression of the rules adopted by the majority of the day. Liberal constitutions put premium on conflict management, inclusion, evolutionary (incremental) change that would be both open to diversity and accommodate it as a social and normative fact, a trust that is built over time among different components of the polity. A resentful constitution, however, thrives on disengagement and distrust and revolutionary tradition. It builds on the avowed objective of clean slate and starting from zero and the drive to settle fundamental questions once and for all. Such a constitution of fear reflects a unified vision of the people and a monolithic state. The people are defined by sameness, not difference. Importantly, the fear is given competing understandings depending on the perspective. A Constitution of fear is no longer a tool to protect against the state, rather it becomes a tool to entrench power and exclude dissent to create a flattened and barren public sphere. The competition among possible constitutional ideologies and visions of the most desirable models of the state is excluded. Such a constitution petrifies the partisan vision and credo of the powers that be, right here, right now. Such a constitution is an extension of the ever-present legal instrumentalism and drive to settle the score for the past wrongs, exclude the traitors, bring to light their misdeeds and vindicate the long-suppressed vision of the Polish nation and state. In the end, a constitution becomes a political manifesto of power, not a safeguard against the arbitrary power.

### *2. The Law understood as will of the majority + 3. Suspicion of inter/supra/national institutions*

As there is no place for a veto emanating from within the government other than from the majoritarian parliaments, the politics of resentment target institutions that otherwise might be seen as a brake on the power of the people's representatives. The institutions are only accepted if they are seen as "our" institutions and translate only messages that the ruling parties believe deserving of being present in the public sphere. Such an understanding leads to an important tweak to the established narrative: institutions that have been channeling (for populists "distorting") the rule of

law (see commandment 10 below) must be dealt with as expeditiously as possible. All institutions – domestic and supranational and international – stand in the way of the new doctrine and as such will not be tolerated. With extreme majoritarianism as one of the new doctrine's cornerstones, disabling constitutional courts and judicial review has been the first order of the day for constitutional capture. Not surprisingly, the Polish Constitutional Court was the first one to go ... The success of the doctrine depended on disabling the guardians in the first place.

#### *4. Primacy of politics over law and the political over the legal*

The law has no independent standing: it is understood as the outcome of political action, used and abused to achieve whatever objectives the current majority wants to pursue. The law becomes a blunt political instrument. It no longer tames politics, rather it serves the political. For populists, liberal constitutions with their openness and inclusion are unnecessary inventions of elitist minorities and only distort the communication between the representatives of the people and the people themselves. As such, it must be remodelled and harnessed so as to enable and protect the decision-making that at long last reflects the purified rule of the people. With this, one of the post-1945 paradigms according to which "politics must adapt to laws, not the law to politics" (*"Politia legibus, non leges politiae adaptandae"*) becomes obsolete.

#### *5. New kind of political conflict*

The politics of resentment in Poland transform our traditional understanding of political conflict centred around liberal values of pluralism and tolerance. While politicians and political parties in liberal democracies routinely put forward competing visions for society and politics, they always stick to the language of probability in setting out their alternatives to the existing government. As argued [here](#) they are prepared to test their alternatives through procedures and elections and accept that the constitution is the stage that frames political contestation. As liberal democrats, they share a commitment to the core values of freedom and equality and the formal acknowledgement that their political adversaries have as valid a claim to represent the people as they do.

#### *6. What are the constitutional courts for? + 7. Checks on power and rights of the opposition seen as constraints on the true will of the people*

Judicial review, one of the great achievements of 1989 (r)evolution(s), is discarded with dramatic consequences. What was for long overlooked is the fact that the constitutional court is not seen as a mere obstacle to be removed. A constitutional court's role as one of the linchpins of a new liberal democratic order is transformed from a counter-majoritarian institution to an ally of the majority and a government enabler. As I have [previously argued](#), three interconnected transformations now determine the face of what used to be the Polish Constitutional Court: i) judicial review is being *weaponized* and used against the opposition; ii) *instrumentalizing* constitutional review in the process of implementing the political agenda; and finally, iii) judicial *rubber-stamping* of all unconstitutional schemes placed before it by the ruling majority. Today I would add: iv) *using* the court room to create, what [O.](#)

[Kirchheimer](#) termed, “effective political images” that cast some political actors as villains (“the justice has been done to them”) and others as political heroes (“their virtuousness has finally been rewarded”). The political justice must be swift and leave public opinion with indelible and black-or-white memories. The constitutional review acts as an enforcer of the political justice. Quite a change from what we had aspired to back in 1989 ...

*8. Collectivity (community) over the individual (citizen) + 9. human rights („dignitary rights”) take backstage to the interests of ethnocultural community*

The constitution of fear (commandment no 1) aims to transform the citizens into the anonymous, ethnic and pure people where individualism takes the backstage to the communal. Open and participatory citizenship are concepts alien to the constitutional language of the new doctrine. Those who plead their human rights to the detriment of the state, and even dare to take their grievances to the supranational level, are cast aside as traitors. Think [for example](#) of the backlash against those judges who had the courage to refer to the Court of Justice questions for preliminary rulings. Again, there is no place for nuancing here.

*10. From the rule of law to the rule by law*

And, most crucially, the changing understanding of the rule of law. The rule of law no longer frames the decision-making process, *but rather*, it facilitates the expression of the will of the people (or their representatives). Rule of law is seen as an obstacle to protecting the collectivity and the common good. First, the Polish government has been insisting that the rule of law should be interpreted differently from what was hitherto accepted. Second, that there is no agreement on what the rule of law entails in practice (application). Those two new elements transform the rule of law – one of the paradigms of the post 1989 transition. Poland has been steadily moving away from *the rule of law* and embracing *the rule by law*. Mere legality of the majority suffices to legitimise the law.

## The Counter-Constitution

Now combine elements 1-10 and what you get is a new constitutional design centred around the resentful counter-constitution that redraws constitutional boundaries by sheer politics of force. The force creates the facts on the ground and does not pay much attention to the constitutional constraints. The qualification “[counter](#)” emphasises that this new constitutional setting is built in direct opposition to the liberal understanding(s) that prevailed post-1989 and inspired the drafters of the Polish 1997 Constitution (by the way still in force ...).

## How the new doctrine taints the European Union

My argument, writing on October, 9, 2019, is that the content of the doctrine has been more or less established and the new paradigms of the counter-liberal narrative have now been firmly put in place. What changes, and will change, are the plots,

characters and the doctrine's reach. That said, there should be no doubt as to how the new doctrine will respond to the internal and external attempts undertaken to undermine it.

The last point is important as the doctrine has now clearly zeroed in on the EU and its judicial system in particular.

The respect for courts and their decisions and the trust in the reformatory power of law have been at the forefront of the European integration and defined the post-war liberal consensus. The authority of the Court of Justice, the binding nature of its rulings and the emancipation of national courts as courts of general jurisdiction in the sphere of Union law were essential parts of the original consensus that paved the way for the first Communities. The destructive and antagonising self-help was ruled out and so was the contractual principle *do ut des* according to which "I perform as long as you perform". Rather it was left to the courtroom with its own logic, argumentative framework(s) and a set of principles, to define the content and extent of the obligations undertaken on Accession day. For the community of law to survive, any unilateral action by the states was to be banished from the Community vernacular. The post war liberal constitutionalism has been firmly anchored in "never again", underpinned in turn by three fundamental propositions: i) the Constitution is the ultimate law of the land that ii) disciplines the fleeting majorities through the regime of constitutional rights and independent institutions. Last but not least, iii) every political power is a constrained power by courts. The supranational courts (the Court and the ECHR) would play a special constraining role here and put brakes on the excesses of the domestic political process. The pledge of "never again" was supposed to be the long-lasting lesson from the past. The world of European post-war constitutionalism is defined by restraint and moderation and as such is alien to the new authoritarians. For them the argument "because we won" tramples everything.

With the return of such blunt majoritarianism and no-holds barred politics we forget what put Europe on the brink in the 20th century and left it in rubble. All this explains why the Court of Justice (or any court for that matter) has now become the deadliest enemy of the authoritarian regime in Poland. In line with the dominant narrative, all independent institutions must be captured and serve the ruling majority. The problem with the Court of Justice, though, is that it cannot be captured, as was the case with the Polish Constitutional Court, the ordinary courts and now the Supreme Court. Thus, it must be ridiculed, its judges are under personal attack and its decisions are being openly defied and characterised as an inadmissible intervention into the domain of sovereign rights of the Polish people. As argued here, one of the tenets of the new doctrine is no place for any independent (judicial) institution.

## **From BREXIT to ... POLEXIT?**

With this the stage for the principal confrontation between two kinds of opposing legalities has been set.

By rejecting the Court of Justice, capturing the independent judiciary and attacking the preliminary ruling procedure, rewriting the liberal rule of law, Poland is turning its back on the community of law and the principles that the generations of Poles yearned for post 1945, and now seem ... shockingly ambivalent about.

The European stakes (and costs) of the domestic constitutional reshuffling happening right before our very eyes should be spelt out in so many words: either respect the core rules of the community that you voluntarily accepted on Accession day *or* leave. With the relentless attacks on the Court and the EU judicial system that followed into the footsteps of the emasculation of the constitutional review and incapacitation of the judiciary and calling into question the very paradigms that shaped Polish democratic transformations in 1989, POLEXIT has already started. On the eve of the parliamentary elections this October we should be very clear about this.

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